

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 8681 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE M.R.CALLA

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1. Whether Reporters of Local Papers may be allowed : YES
to see the judgements?
2. To be referred to the Reporter or not? : YES
3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge? : NO

VIJAYSINH BHAMABHAI DODIYA

Versus

STATE OF GUJARAT

Appearance:

MR YOGESH S LAKHANI for Petitioner
Mr.V.B.Gharania, learned A.G.P.
for Respondents Nos.1 to 4.

CORAM : MR.JUSTICE M.R.CALLA

Date of decision: 16/12/1999

ORAL JUDGEMENT

1. This Special Civil Application is directed against the order dt.20.8.99 (Annexure 'A' to the petition) whereby the petitioner, who has been working as a Professor in Surgery, was placed under suspension.

2. While the petitioner was working as Professor in Surgery at M.P.Shah Medical College, Jamnagar, by an order dt.26.11.98 he was transferred to Bhavnagar. Against this transfer order dt.26.11.98 the petitioner preferred a Special Civil Application No.10558/98 alleging that the petitioner held the post of Professor since 1986 and that

he was a recognised Post Graduate Teacher since 1987, that he held various positions of academic distinction in various Universities and other academic bodies. The aforesaid transfer order was challenged on the grounds of malafides and it was submitted that the transfer order was aimed to deprive the petitioner of the positions of academic distinctions including membership of the Senate and the Academic Council of Saurashtra University, as also the membership of the Medical Council of India including that of the membership of the Executive of the Medical Council of India, further that respondent No.4 in that petition i.e. Special civil Application No.10558/98 had lost against the petitioner in the elections for the membership of Medical Council of India and that the said respondent No.4 in that petition i.e. Special Civil Application No.10558/98 was having a political clout in the ruling party. It was further alleged that there was no Post Graduate Teaching at Medical College, Bhavnagar and there were about seven Post Graduate students registered under him at Jamnagar where there was a Post Graduate Teaching. That Post Graduate Teaching at Jamnagar would be seriously affected, including the fate of those seven students, who were registered under him because he was a recognized guide for Post Graduate Teaching and Research work and his transfer at that juncture during the middle of the session is bound to affect the future prospects of the students and further that his transfer to a place where there was no Post Graduate Teaching could not be said to be in public interest, rather it was against public interest, that the transfer order had been passed for collateral purposes and extraneous reasons not at all germane to the requirements of public interest and further that no one had been posted vice him at the Medical College, Jamnagar. In this Special Civil Application No.10558/98 stay order was passed in petitioner's favour on 10.12.98 and a copy of the said order has been produced during the course of arguments by Mr. Lakhani in which the case of the petitioner, as narrated above against the transfer order, had been recorded. Thus the operation of the transfer order dt.26.11.98 was stayed and it was ordered that the petitioner shall be allowed to function as Professor at Jamnagar as he was functioning prior to the passing of the impugned order dt.26.11.98. This ad interim order was later on confirmed on 29.12.98 with liberty to the respondents to apply for modification of the order after filing a detailed parawise reply. Mr.Lakhani has also produced a copy of the order dt.11.3.99 passed in the aforesaid Special Civil Application No.10558/98 whereby the aforesaid interim order was vacated on the ground that the Medical College

at Bhavnagar was left without a Professor in Surgery. A copy of this order dt.11.3.99 has also been produced by Mr.Lakhani during the course of arguments. Against this order dt.11.3.99, whereby the stay order was vacated, a Letters Patent Appeal was preferred by the petitioner but the same was dismissed on 30.3.99. However, Special Civil Application No.10558/98 is still said to be pending.

3. Petitioner's case is that he proceeded on leave from 12.3.99 on the ground that his mother was suffering from a serious ailment. He remained on leave upto 26.4.99 and on 27.4.99 he submitted an application to the Secretary, Health and Family Welfare Department as a joining report stating therein that from 12.3.99 to 26.4.99 he was on commuted leave because of his mother's ill health. It was further stated in this joining report that on 26.4.99 he had inquired at Government Medical College, Bhavnagar and was replied that the post of Professor of Surgery at Government Medical College, Bhavnagar had already been filled up by promoting one Dr.M.R.Patel. It has been given out that Dr.M.R.Patel, who was working as an Associate Professor, was promoted as Professor at Bhavnagar and he resumed as Professor on 14.4.99. It appears from the copy of the joining report dt.27.4.99 placed on record with this petition as Annexure 'B' that the petitioner requested for issue of necessary orders as to where should he join his duties. However, he did not receive any reply in response to his joining report dt.27.4.99 and no posting order was issued. The petitioner, therefore, sent another letter dt.13.5.99 in the matter of his posting but no reply was received and thereupon he met the concerned Commissioner on 31.5.99 and he was told that he would receive the orders in due course. It is also the case of the petitioner that in the meanwhile on 15.3.99 one Dr.Sharad Vyas was transferred from Ahmedabad to Jamnagar but he did not join and on 26.4.99 he was retransferred to Ahmedabad and it is also the case of the petitioner that so far as the post of Professor in Surgery at Medical College, Jamnagar is concerned one Dr.Shukla, Associate Professor, was appointed on contract basis, but no posting is given to the petitioner. Thereafter, on 28.6.99 an order was passed giving posting to the petitioner at Bhavnagar as Dr.M.R.Patel, who was working at Medical College, Bhavnagar had been transferred to Rajkot. This order dt.28.6.99 was served upon the petitioner on 1.7.99 and immediately thereafter he resumed his duties at Bhavnagar on 5.7.99. On the next day of his joining at Bhavnagar, the petitioner again proceeded on leave from 6.7.99 and while he was on leave,

a show cause notice dt.13.7.99 was sent to the petitioner, which was replied by him on 16.7.99, which was followed by another reply dt.20.7.99. Thereafter, the present impugned order dt.20.8.99, Annexure 'A' was passed placing the petitioner under suspension. Against this order dt.20.8.99 the present Special Civil Application was filed in this court on 1.11.99. When the matter came up before the Court on 1.12.99, rule was issued and made returnable on 8.12.99. Appearance was also entered on behalf of the respondents through Mr.R.C. Kodekar and on 8.12.99 the matter was made to stand over on 10.12.99 and again to 13.12.99 and on 13.12.99, learned A.G.P. submitted that the matter may be kept on 15.12.99 and both the sides requested that the matter may be finally argued on 15.12.99. No return was filed and the matter was argued.

4. Learned counsel for the petitioner has submitted that the suspension order, as has been passed in the instant case, is wholly unjustified and unwarranted, the same has been passed without considering the detailed reply as had been given by the petitioner on 16.7.99 followed by another reply dt.20.7.99. He also submitted that from the tenor of the order, as has been passed, and the contents thereof, it is clear that the order has been passed as a punitive order and the contents thereof also cast aspersions against the petitioner and further that it is apparent from the order dt.20.8.99 itself that the petitioner's replies have not been considered and so far as the question of holding the Departmental Inquiry is concerned, it has not been mentioned as to whether inquiry was to be held for minor or major punishment and the learned counsel for the petitioner has submitted with vehemence that there was no basis in the instant case so as to warrant petitioner's suspension and that it was a plain and simple case of abuse of the power and a case of wholly arbitrary exercise of the power so as to place the petitioner under suspension. On the other hand, without disputing the fact situation, Mr.Gharania, learned A.G.P. has submitted that the Government was within its powers to place the petitioner under suspension as a Departmental inquiry was proposed to be held against him as per the order dt.20.8.99 itself. He submits that it can not be said to be a punitive order, there is no question of any aspersion. Mr.Gharania has submitted that in the facts and circumstances of this case, it is very clear that the petitioner had proceeded on leave to avoid compliance of the transfer order dt.26.11.98, he proceeded on leave after the stay order in his favour was vacated on 11.3.99 and thus no exception can be taken against the suspension order and this Court may not

interfere with the suspension order as had been passed.

5. I have considered the submissions made on behalf of both the sides. So far as the period upto 11.3.99 is concerned, there was a stay order operative in favour of the petitioner. For the period from 12.3.99 to 26.4.99, petitioner had ofcourse been on leave on the ground of his mother's serious ailment. He had submitted the leave application on 11.3.99 to the Dean of the M.P.Shah Medical College, Jamangar where he was working till that date on the basis of the interim order passed by this Court and in this Application, the ground that his mother was sick and necessary Certificate and Forms will be submitted later on, had been clearly mentioned. Use of the word 'sick leave' in this Application appears to be erroneous inasmuch as the petitioner himself has categorically mentioned in the joining report dt.27.4.99 that he was on commuted leave. It is not the case of the respondents that leave for this period i.e. from 12.3.99 to 26.4.99 was refused. The copies of the Hospital records, as have been produced at page 21 with this petition show that petitioner's mother was under treatment from 12.3.99 for a period of six weeks and was advised rest and again from 6.7.99 for a period of one month. Copies of the Certificates enclosed with this petition at page 24 Annexure 'E', at page 25 Annexure 'F', at page 30 for the period from 6.7.99 onwards, as have been issued by the authorised Medical Officer of the Irwin Group of Hospital, Jamnagar do support the case of petitioner's mother being sick. The petitioner has also produced a copy of his leave Application in the prescribed form according to Rules so as to show that 12.3.99 was the date of the commencement of his leave. Similar Application in prescribed form for leave is at page 33 and the copy of the application dt.5.7.99 as was addressed to the Additional Director of Medical Education also supports the petitioner's case.

6. Thus it is clear that till 11.3.99 there was an interim order in favour of the petitioner by this court and thereafter he has remained on leave upto 26.4.99 and again after 6.7.99 on the ground of his mother's sickness for which there is ample material on record. The petitioner had asked for the posting at the first available opportunity when he joined on 27.4.99 and had repeated and reiterated his request as aforesaid and thus it is clear that on 27.4.99, when he joined after availing the leave, there is no question of his joining at Bhavnagar because he was told that there was no post of Professor available at Bhavnagar so as to permit joining to him at Bhavnagar and after the submission of

the joining report on 27.4.99 followed by his request dt.13.5.99 and the personal meeting with the Commissioner on 31.5.99, for the first time the posting order was issued on 28.6.99, which was served upon him on 1.7.99 and thereafter he immediately joined at Bhavnagar on 5.7.99 and again proceeded on leave on the ground of his mother's sickness. In such a situation, when the show cause notice dt.13.7.99 was given to the petitioner, which was adequately replied by the petitioner on 16.7.99 and 20.7.99, the suspension order could not be passed without taking into consideration the petitioner's case as was held out by him in his replies dt.16.7.99 and 20.7.99. It is not in dispute that prior to 28.6.99 no posting order was issued and, therefore, there is no question of joining at any place by the petitioner. It is a different matter that the petitioner was on leave on the ground of his mother's sickness. But when the leave was over, it was not possible for him to join at Bhavnagar and he was in fact not allowed to join at Bhavnagar and on his request for fresh posting or as to where he should join, the order was issued for the first time on 28.6.99 in pursuance of which he joined on 5.7.99.

7. The contention of the learned counsel for the petitioner appears to be correct that this order has been passed without considering petitioner's replies to the show cause notice. What to talk of dealing with the submissions made by the petitioner in his reply dt.16.7.20, the suspension order dt.20.8.99 does not make even a bald reference to the petitioner's replies dt.16.7.99 and 20.7.99, as if the giving of the show cause notice dt.13.7.99 and the reply thereof called for from him through this notice, had no consequence or no implication. If the show cause notice had been given, the reply which had been sent by the petitioner, ought to have been considered before passing any order against the petitioner. What to talk of the consideration of these replies, the author of the impugned order of suspension has not even taken care to refer to these replies and even to say that any such reply had been received. Therefore, non consideration of the replies is obvious and is apparent on the face of the record and from the contents of the suspension order dt.20.8.99 itself.

8. Genuineness of the Certificate with regard to the petitioner's mother's sickness has not been questioned nor any communication was sent to the petitioner that his leave has been refused. In such cases, when a Government employee or Officer is transferred and he wants to challenge the order, he may decide to contest the matter

by way of seeking judicial remedy and for that purpose if a litigating party thinks that he has a case against the order and he proceeds to approach the court for the purpose of obtaining appropriate orders, such party is within its right to do so. One may speculate that the petitioner may have proceeded on leave on the pretext of the mother's sickness but that speculation in the facts of the present case does not combat the documentary evidence, which has been placed on record by the petitioner from the concerned Hospital. It could also be a case of coincidence with reference to the dates and even if it is assumed that the petitioner had deliberately proceeded on leave, it cannot be said in face of the available record that the petitioner had misconducted himself so as to warrant suspension. Mr. Gharania, learned A.G.P., is right in his submission that the Government has the power to place an employee or an officer under suspension in appropriate cases, but equally settled position of law is that the power has to be exercised after due application of mind. Such powers cannot be exercised in an arbitrary manner. It has been noticed that in large number of cases suspension orders are passed even if the passing of the order is not warranted or at least avoidable. In the present case, the interim relief in favour of the petitioner, which was operating in the earlier petition, was vacated on the ground that there was no Professor in Surgery at Bhavnagar and that very ground was defeated by the Government itself by placing the petitioner under suspension now when he had already reported on duty and the facts, as have been narrated hereinabove, also show that the Government went to the extent of keeping a Professor at Jamnagar on contract basis while a person i.e. the petitioner, who was in service since long, was already available. The facts of the case are eloquent to show that the ground which the respondents themselves urged before the court for the purpose of vacating the interim order has been defeated by the respondents themselves. The contractual appointment appears to have been given at Medical College., Jamnagar and even when the petitioner joined on 27.4.99, the posting order was not issued in his favour until 28.6.99. If no Medical College was to be left without a Professor, as was the case of the Government itself, what possible explanation can be given for not issuing the posting orders with regard to the petitioner for the period on and from 27.4.99 to 28.6.99. All these facts and circumstances attendant and preceding to the passing of the suspension order clearly indicate that it is a case in which strictly speaking there was no such misconduct on the basis of which suspension was warranted. The power with

regard to the suspension under the Rule may be there with the Government but such power has to be exercised in appropriate cases with due application of mind. It is again the settled law that more the power more should be restraint. Government employees and Officers are not supposed to be placed under suspension for trifles and trivials. In the facts of the present case, even technically, it cannot be said to be a case of any misconduct on the part of the petitioner. If he has avoided the compliance of the transfer order on the basis of the interim orders and thereafter proceeded on leave on the ground of his mother's sickness, and in such cases of avoiding and not evading, it cannot be said that it was a case for suspension. No doubt suspension by itself is not a punishment, nevertheless it is also not a reward either. A person, who is placed under suspension, has to suffer the evil and unhappy consequences of such suspension. Even if such consequences are assumed to be unintended, it has to be remembered that the injury, agony and suffering is the same, whether the consequences are unintended or otherwise. Therefore, the authorities charged with the powers of passing the suspension order have to exercise that power with abundant caution and as far as possible, the passing of the suspension order should be avoided unless there is a case of gross misconduct so as to warrant a major punishment or it is felt that the presence of the Officer is likely to interfere with the process of inquiry. In the instant case, it is also not clear as to whether the proposed inquiry was for major or minor punishment and it has also not been prima facie established by the contents of the suspension order in face of the replies filed by the petitioner that the petitioner had misconducted himself so as to face the suspension. Taking of such drastic action of placing a Government servant under suspension, if adhered to even in cases where there is no misconduct or no prima facie evidence of misconduct, certainly leaves at least for some time a question mark on the service career notwithstanding the fact whether it is a punitive order or not. Although in the instant case even by way of narration of the case in the body of the impugned order of suspension passed on 20.8.99 a blemish is indicated as it has been mentioned that the action of producing the sick certificates and the steps taken by the petitioner in this regard are suspicious and that it was a tendency of avoiding the duty on the basis of the mother's sick Certificate, whereas in face of the documentary evidence available on record, it cannot be said that these documents are not genuine.

9. Be that as it may, in the facts of the present

case, this Court finds that the power with regard to the suspension has been exercised in a wholly arbitrary manner. The suspension was not at all warranted and as a result the impugned order dt.20.8.99, having been passed without application of mind and without taking into consideration the replies filed by the petitioner in response to the show cause notice and other facts and circumstances attendant and precedent to the passing of this order, show that this order cannot be sustained in the eye of law and in the opinion of this Court, the respondents will be well advised to re-consider the question as to whether is it a fit case for holding any inquiry against the petitioner in the face of the documents placed on record by the petitioner alongwith his replies dated 16.7.99 and 20.7.99.

10. In the result, the impugned order dated 20.8.99 placing the petitioner under suspension is hereby quashed and set aside and the respondents are directed to reinstate the petitioner with all consequential benefits as if no suspension order had been passed. The direction to be complied forthwith. This Special Civil Application is allowed in the terms as aforesaid. Rule is made absolute accordingly. No order as to costs.